

Case
v. 2455

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CLARENCE JAMES LOPEZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,525

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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FILED

APR 9 1968

WM. B. LUCK, CLERK



SUBJECT INDEX

I. Jurisdictional Statement of Facts.....	1
II. Statement of Facts	2
III. Opposition to Specification of Errors.....	2
IV. Argument	2
V. Conclusion	6

CASE INDEX

<i>Application of Gault</i> (1967) 387 U.S. 1, 87 S. Ct. 1428	5, 6
<i>Glasser v. United States</i> , (1942) 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680.....	6
<i>Miranda v. Arizona</i> , (1966) 384 U.S. 437, 17 L.Ed. 2d 694, 86 S. Ct. 1602.....	6

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I.

JURISDICTIONAL STATEMENT OF FACTS

The Government accepts and hereby adopts Appellant's
Jurisdictional Statement.

II.

STATEMENT OF FACTS

The Government accepts and hereby adopts Appellant's Statement of Facts, with the addition that will be set out in the argument. (Hereinafter the Clerk's Record of the Transcript on Appeal will be referred to as "RC," the Reporter's Transcript of the testimony will be referred to as "RT," the number following will refer to the page and the number following "L" will refer to the line; the Appellant, Clarence James Lopez, will be referred to as "Juvenile" or "Appellant.")

III.

OPPOSITION TO SPECIFICATION OF ERRORS

The District Court did not err in admitting into evidence the statement made by the Juvenile.

IV.

ARGUMENT

The Appellant, with the presence of his mother, was advised as to his "rights" and did make a voluntary waiver of those rights.

The testimony of Special Agent Donald Marsland showed that the defendant was asked to bring his mother into the

room after he and another FBI agent had identified themselves and told him they were federal officers. They asked him if he would mind talking to them and he said that he would not. They told him they wanted to talk to him about the attack on his grandfather, Xavier Rios. They asked if his mother was present and asked that she join them. They read him his "Miranda" rights from a form, Government's Exhibit 24 in Evidence, and it is as follows:

"YOUR RIGHTS

Place: Tucson

Date: June 2, 1967

Time: 1:26 p.m.

"Before we ask you any questions, you must understand your rights.

"You have the right to remain silent.

"Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

"If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at anytime. You also have the right to stop answering at anytime until you talk to a lawyer.

"A lawyer will also be provided for you now, if you wish, by the Federal Public Defender's Office, Phoenix, Arizona, whom you may call at 253-7907.

"WAIVER OF RIGHTS

"I have read the statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this

time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

/s/ Clarence Lopez

"Witness: Donald W. Marsland, SA, FBI
San Xavier, June 2, 1967

"Witness: Alan H. Harrigal, SA, FBI
San Xavier, June 2, 1967

Time: 1:32 p.m."

They had the Juvenile explain to them what had just been read to him. Then they asked him if there was anything he would want explained. The Juvenile asked to have explained the word "coercion" to him (RT 110 thru 116). He was left alone to discuss it with his mother (RT 119, L 21-22). It took from 1:26 p.m. to approximately 1:32 p.m. to explain his rights to him and to discuss his rights with him and to have his mother discuss his right with him alone (RT 110, L 15 and 122, L 8). He then was asked if he waived his rights and was willing to answer questions. He stated he would, and he executed the waiver (RT 114).

The Juvenile's counsel then asked to have an opportunity to place the Juvenile on the stand for the purpose of showing no understanding of the waiver (RT 126, L 9-11). The Juvenile then waived his right to take the stand (RT 126, L 18-19). The matter was then argued and the Court found:

"THE COURT: Everything that is before the Court indicates he did understand his right, that the agents were very, very careful to see that he did and all of the evidence

in the case indicates he practically demonstrated his understanding of what they were trying to get across to him. I think we would have a much more serious grounds for complaint if they had taken him away from his home and had taken him to some office where he was in strange surroundings. But they went to his home, in the presence of his mother, they insisted she come in and be there so he could have the benefits and comfort of her presence. Apparently immediately that suspicion began to focus on him, that they again advised him of his rights. I think the evidence makes it clear that he was advised of his rights and all of his rights and that his statement, that any statement he made, I assume from what has been said, before he did make a statement, was made voluntarily and understanding his rights and without any coercion, any promises or threats and it was voluntary. Therefore the objection to the statement is overruled." (RT 127, L 18 to 128, L 11)

The Juvenile gave several different versions during the interview. Several times his mother, when he would give one of his versions, would state: "Clarence, you are not telling them the truth, tell them the truth". (RT 131, L 1-2; 133, L 8-9) He then stated that he did it. He stated, "I did it with another guy." (RT 133, L 10)

At this point, the agent again advised him as to his rights and told the Juvenile to discuss it with his mother. They left the room (RT 133). They returned in about ten minutes and the Juvenile then requested an attorney (RT 133, L 16-17).

He was immediately taken to Tucson before the United States Commissioner and an attorney was appointed for him (RT 133, L 23-24).

In the *Application of Gault*, (1967) 387 U.S. 1, 87 S.Ct. 1428, the Supreme Court stated at page 55:

"We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the privilege."

Appellant argues that the Court should adopt the recommendations of the President's Crime Commission which were quoted in the *Application of Gault, Supra*, but the Supreme Court did not adopt them.

On appeal, the evidence must be construed in the light most favorable to the Government. *Glasser v. United States*, (1942) 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

The Court did find the statement was voluntarily made and an intelligent waiver of rights was made. Appellant argues at page 16 of the Opening Brief, that the Juvenile should have been allowed to complete his statement since he had waived his rights. Counsel overlooks the rule of *Miranda v. Arizona* (1966) 384 U.S. 437, 17 L.Ed. 2d 694, 86 S.Ct. 1602, that a defendant has the right to refuse to answer questions at any time.

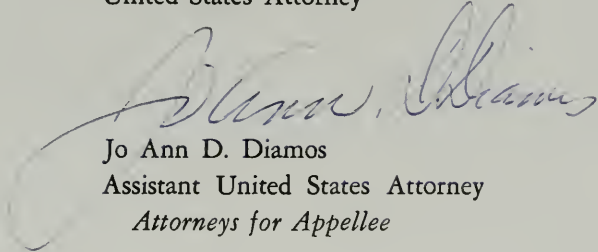
V.

CONCLUSION

It is respectfully submitted that the statement of the Juvenile was made after he was fully advised as to his rights, understood them, and waived them.

Respectfully submitted,

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Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



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Three copies of the Brief of Appellee mailed this ^{5th}.....
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